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Office of the Commissioner

News & Information

Contact: Kevin Smith 609/292-7832

Notice of Proposed Regulation

**Re: Proposed Amendments: N.J.A.C. 12:60 concerning
Debarment Regulations**

Attached please find the above-referenced matter which was published in the
July 1, 2002 *New Jersey Register*.

If you have any questions, please contact Frederick S. Cohen, Regulatory
Officer I at 609-777-2960.

(a)

LABOR STANDARDS AND SAFETY ENFORCEMENT
Prevailing Wages for Public Works
Debarment From Contracting
Proposed Amendments: N.J.A.C. 12:60-8.2 and 8.3

Authorized By: Albert G. Kroll, Commissioner, Department of Labor.

Authority: N.J.S.A. 34:11-56.25 et seq.

Calendar Reference: See Summary below for explanation of exception to the calendar requirements.

Proposal Number: PRN 2002-214.

A public hearing on the proposed amendments will be held on the following date at the following location:

Tuesday, July 30, 2002
 10:00 A.M. to 12:00 Noon
 New Jersey Department of Labor
 John Fitch Plaza
 13th Floor Auditorium
 Trenton, New Jersey 08625

Please call the Office of Regulatory Services at (609) 292-7375 if you wish to be included on the list of speakers.

Submit written comments by August 30, 2002 to:

Frederick S. Cohen, Regulatory Officer
 Office of Regulatory Services
 New Jersey Department of Labor
 PO Box 110—13th Floor, Suite G
 Trenton, New Jersey 08625-0110
 Fax: (609) 292-8246

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The agency proposal follows:

Summary

Pursuant to its statutory responsibility to oversee enforcement of the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq., the Department of

Labor has undertaken a review of the rules which govern implementation of the Commissioner of Labor's authority in that regard, N.J.A.C. 12:60. As a result thereof, it has been determined that subchapter 8, which governs the modalities associated with the debarment of a contractor from the public works bidding process, needs to be further delineated so as to reflect the spirit and intent of the Prevailing Wage Act, as well as to clearly specify the circumstances under which a contractor may be suspended from bidding on or engaging in public works projects pending debarment. Moreover, the Department has determined that the bases for a suspension pending debarment and the due process rights of affected contractors need to be defined with greater precision. Thus, the Department is proposing to amend N.J.A.C. 12:60 to reflect the foregoing.

A summary of the proposed amendments follows:

N.J.A.C. 12:60-8.2 is amended to redefine the term "suspension" to mean that an affected contractor shall not bid on or engage in any public works project effective upon the date on which the contractor receives the Commissioner's notification of suspension pending debarment. Suspension shall not include public works projects bearing award dates which precede receipt of said notification.

N.J.A.C. 12:60-8.3(d)1 through 4 have been added to identify the bases which would warrant the suspension of a contractor pending debarment. Those include a history of previous violations by the contractor of the New Jersey Prevailing Wage Act or Contractor Registration Act or the regulations which govern same; a history of prior debarment or of a penalty imposed in a contested matter; the existence of other pending contested prevailing wage or contractor registration matters; and the size and scale of an outstanding audit by the Department's Division of Wage and Hour Compliance. The proposed rule has been amended with the consent of the Attorney General to vest in the Commissioner the discretionary authority to determine under the bases set forth in N.J.A.C. 12:60-8.3(d)1 through 4 if a contractor should be suspended from bidding on or engaging in any public works project, pending debarment.

N.J.A.C. 12:60-8.3(d)5 has been added to set forth aggravating factors which would further justify suspension of a contractor pending debarment. The factors include, but are not limited to, falsified testimony or statements; attempts made to evade investigations conducted by the Department; attempts to intimidate or coerce workers from cooperating in an investigation; a history of not adhering to prior settlement agreements reached previously with the Department regarding the payment of wages, fees and penalties; and a history of hiring subcontractors who have been found to be in violation of the New Jersey Prevailing Wage Act or Contractor Registration Act.

N.J.A.C. 12:60-8.3(d)1 has been recodified as subsection (e) and amended to provide that when a person is suspended from contracting for or engaging in public works projects, the person suspended shall be given written notice thereof which may be included in the notification of debarment and that the written notice shall contain the following information: that suspension has been imposed, the date on which it becomes effective and the reasons therefor. In addition, the written notice shall also contain an indication that if the contractor chooses to contest the suspension, he or she must so notify the Department in writing of that decision within 72 hours of receipt of the notification of suspension.

N.J.A.C. 12:60-8.3(f) has been added to provide that a hearing on the suspension will be held before the Director of the Division of Wage and Hour Compliance, or his or her designee, within seven days of the receipt by the Department of the contractor's notification contesting debarment. The proposed N.J.A.C. 12:60-8.3(f) also sets forth the contractor's right to present expeditiously any evidence in support of his or her position; that, if necessary, the suspension will be reevaluated by the Department in light of the evidence produced; that the Director or his or her designee shall issue a written determination upholding or reversing the suspension within five business days of the hearing and, if the contractor disagrees therewith, he or she shall appeal the Director's determination to the Office of Administrative Law in connection with the underlying debarment action.

Because the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments will have a positive social impact since they will ensure that the Department is better able to perform its statutory responsibilities as the enforcing agency of the New Jersey Prevailing Wage Act. By so doing, the proposed amendments will serve to further protect the workers of this State who labor on public works construction projects by refining the regulatory mechanisms which are designed to ensure that contractors who are prepared to bid on and engage in those projects pay the

appropriate prevailing wage to those workers. The proposed amendments will also be of benefit to contractors since they specifically set forth the circumstances under which a contractor can be suspended pending debarment, thereby providing less chance that the suspension option will be misunderstood. Furthermore, the contractors will also benefit from the further delineation of their due process rights when faced with a notification of suspension pending debarment. The end result will be a more efficient process for enforcement of the Prevailing Wage Act and a clearer understanding of the rights and responsibilities of both contractors and workers.

Economic Impact

The proposed amendments will have a positive economic impact on both the workers and contractors who comply with the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq. Specifically, they will help safeguard the general economic well being of the workers who perform work on public works projects, while also shielding them, as well as their employees, from the rigors of unfair competition which flow from those who seek to skirt the prescribed prevailing wage payment scale. As a result, contractors will have a level field within which to bid on and engage in public works projects while workers will, through receipt of a legally sanctioned wage, be better able to maintain a reasonable standard of living for themselves and for their families. While contractors must bear the cost of paying the appropriate prevailing wage, they will benefit from the situational and procedural clarity of the proposed amendments. A better understanding thereof will also encourage those who bid on public works projects to avoid the legal pitfalls in which those who violate the Prevailing Wage Act, as well as the Contractor Registration Act, could find themselves. Adherence to the law and respect for the regulatory scheme which supports the law will allow contractors to benefit economically from the award of State public works projects while avoiding accrual of costs associated with having to defend against an enforcement action brought pursuant thereto. Conversely, those contractors who fail to abide by the law as embodied in the New Jersey Prevailing Wage Act, as well as the Contractor Registration Act, will suffer negative economic associated consequences in the loss of public works contracting opportunities, as well as by having to absorb the costs associated with litigation should the contractor choose to legally challenge the decision of the Commissioner.

Federal Standards Statement

The proposed amendments do not exceed standards or requirements imposed by Federal law; rather, they further implement provisions of the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq. Moreover, there are no Federal standards or requirements which govern implementation of the State Act. As a result, a Federal standards analysis is not required.

Jobs Impact

The proposed amendments will not have a direct impact on jobs in that the Department does not anticipate that there will be a job increase or decrease as a result thereof.

Agriculture Industry Impact

The proposed amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed amendments will continue to impose existing reporting and recordkeeping responsibilities on contractors who engage in public works projects, some of whom may be small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Specifically, all contractors who engage in public works projects, without regard to the size of their individual businesses, must continue to maintain payroll records which comport with the requirements of the New Jersey Prevailing Wage Act. While the number of small businesses so affected cannot be quantified, it should be noted that the proposed amendments apply in equal measure to all businesses, regardless of size, which bid on and engage in public works projects. No added costs would accrue to any business which functions within the parameters of the Prevailing Wage Act. Additional potential costs would only accrue if a contractor so violated the law as to warrant a notification of suspension pending debarment. Those costs, as set forth in the Economic Impact above, would flow from the legal costs associated with challenging the Commissioner's decision to suspend a contractor pending debarment, as well as to costs associated with the loss of public works contracting opportunities.

Smart Growth Impact

The proposed amendments will not impact on the development or redevelopment of New Jersey's urban, suburban or rural areas with regard to issues of protecting open space, conserving natural resources, increasing

transportation options and availability, reducing automobile traffic and dependency, stabilizing property taxes or providing for affordable housing. The proposed amendments will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface text; deletions indicated in brackets [thus]):

12:60-8.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Suspension" means [an exclusion from contracting for future public works or EDA projects for a temporary period of time, pending the completion of debarment proceedings] **that an affected contractor shall not bid on or engage in any public works project effective upon the date on which he or she receives the Commissioner's Notification of Suspension Pending Debarment. Suspension shall not include public works projects bearing award dates which precede receipt of said notification.**

12:60-8.3 Conditions of debarment

(a)-(c) (No change.)

(d) The Commissioner may[, upon approval of the Attorney General], suspend a person pending debarment [action]. **The bases therefor shall include any or all of the following:**

1. A history of any previous violation by the contractor of the New Jersey Prevailing Wage Act or Contractor Registration Act or any of their subsidiary regulations;

2. A history of a prior debarment or of a penalty imposed in contested matter;

3. The existence of other contested prevailing wage or contractor registration matters pending against the contractor;

4. The size and scale of an outstanding audit by the Division of Wage and Hour Compliance is such as to indicate that the alleged violation by the contractor of the New Jersey Prevailing Wage Act, even absent a previous history of violations thereof, is significant and/or

5. Aggravating factors which may include, but are not limited to

i. Falsified testimony or statements;

ii. Attempts to evade investigations conducted by the Department;

iii. Attempts to intimidate or coerce workers from cooperating with the Department and its representatives in the investigation of the contractor;

iv. A history of not adhering to prior settlement agreements reached previously with the Department regarding the payment of wages, fees and penalties; and

v. A history of hiring subcontractors who have been found to be in violation of the Prevailing Wage Act or the Contractor Registration Act.

[1.](e) When the Commissioner suspends a person from contracting, the person suspended shall be furnished with a written notice, **which may be included in the notification of debarment, stating:**

[i.1. That suspension has been imposed [and its effective], the date on which it becomes effective and the reasons therefor;

[ii. The reasons for the suspension, to the extent that the Attorney General determines that such reasons may be properly disclosed; and]

2. **That if the contractor chooses to contest the suspension pending debarment, the contractor shall notify the Department in writing of that decision within 72 hours of receipt of the notification of suspension; and**

[iii.3. (No change in text.)

(f) **A Departmental-level hearing on the suspension will be held before the Director of the Division of Wage and Hour Compliance or his or her designee, within seven days of the receipt by the Department of the contractor's notification contesting suspension.**

1. **The Director, or his or her designee, shall permit the contractor to explain his or her position as to why suspension should not**

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imposed and to present evidence expeditiously in support of that position;

2. At the conclusion of the Departmental-level hearing, the Director, or his or her designee, shall consider all of the evidence so presented and shall reevaluate the necessity of the suspension, if so warranted by the evidence; and

3. The Director, or his or her designee, shall issue a written determination upholding or reversing the suspension and the reasons for same within five business days of the hearing;

(g) If the contractor disagrees with the written determination, he or she shall appeal said determination to the Office of Administrative Law for a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, in connection with the underlying debarment action.
